In the Supreme Court of the United States

October Term, 1977

No. 77-1456

PAMELA PECK,

Petitioner,

v.

WILLIAM DUNN, PETE KUTULAS, and WILLIAM HUTCHINSON, as members of the Board of County Commissioners of Salt Lake County, Utah,

Respondents.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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OPINION BELOW

The opinion of the Utah Court in *Peck vs. Dunn*, appears in 574 P.2d 367 (Utah 1978), and is included herein as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Utah was entered on January 13, 1978. The jurisdiction of this Court is invoked under 28 USC §1257(3).

QUESTION PRESENTED

WHETHER A SALT LAKE COUNTY, STATE OF UTAH ORDINANCE PROHIBITING CRUELTY TO ANIMALS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS BEING VAGUE, OVERLY BROAD AND UNCERTAIN IN MANNER.

STATUTE INVOLVED

Revised Ordinance of Salt Lake County, 1966, as amended Title 16, Chapter 3, Section 28(h):

> (h) *Nuisance to keep animals for fighting.* Any person, firm or corporation who shall raise, keep or use any animal, fowl or bird for the purpose of fighting or baiting; and any person who shall be a party to or be present as a spectator at any such fighting or baiting of any animal or fowl; and any person, firm or corporation who shall rent any building, shed, room, yard, ground or premises for any such purposes as aforesaid, or shall knowingly suffer or permit the use of his buildings, sheds, rooms, yards, grounds, or premises for the purposes aforesaid; and any person, firm or corporation who shall knowlingly carry, haul or deliver any animal, fowl or bird to be used for any of the purposes aforesaid, shall be guilty of a Class "B" misdemeanor, and shall be subject to a fine in an amount not to exceed $299.00 or imprisoned in the county jail not to exceed six months, or both.

STATEMENT OF THE CASE

The facts of the case underlying the petition for certiorari are as follows:

On May 20, 1976, Salt Lake County passed the above ordinance to prohibit gambling activities involving cruelty to animals. Petitioner and approximately fifty other individuals were charged with having violated the aforementioned ordinance on January 8, 1977. More specifically, she was charged as being ". . . a party to or present as a spectator at the fighting or baiting of a fowl. . . ."

In order to arrest her prosecution, petitioner sought a declaratory judgment of that portion of the ordinance under which she was charged as being vague, and uncertain in that innocent conduct could be included within its language, and therefore, it was repugnant to the Due Process Clause of the U.S. Constitution and Article I Section 7 of the State Constitution. Petitioner also challenged the ordinance on the ground that it did not require a culpable mental state.

Respondent's Motion to Dismiss petitioner's complaint was granted by the trial court. The Utah Supreme Court affirmed the trial court action, ruling that the ordinance required a person, in order to be convicted, to purposefully and intentionally attend and observe a cockfight, and, thus construed, was constitutional. The case was then remanded for a trial of the facts and issues of law remaining.

ARGUMENT

I

THE WRIT SHOULD NOT BE GRANTED UNTIL REVIEW BY ALL STATE TRIBUNALS HAS BEEN EXHAUSTED

Petitioner's petition for a writ of certiorari is premature in that petitioner has not exhausted her state remedies before seeking federal review. Indeed, the effect of the ruling by the Utah Supreme Court was to change the nature of the crime charged from a status crime to an intentional crime requiring a person, in order to be convicted as a spectator, to purposefully and intentionally attend and observe a cockfight. The elements of the crime have therefore not been adjudicated at the trial level in the Utah courts, and therefore petitioner has not exhausted all of her state remedies before seeking federal review, see *Osment vs. Pitcairn*, 317 U.S. 587, 87 L.Ed. 481, 63 S.Ct. 21 (1942); *Gorman vs. Washington University*, 316 U.S. 98, 86 L.Ed. 1300, 62 S.Ct. 962 (1941); and *Betts vs. Brady*, 315 U.S. 791, 86 L.Ed. 1194, 62 S.Ct. 639 (1941).

Petitioner's petition for a writ of certiorari is therefore premature and should be denied until after the Utah courts have defined the proof required for establishing the elements of this crime. Particularly, where the Utah legislature redrafted the entire Utah Criminal Code effective July 1, 1973, and the state statutes affecting petitioner's rights, such as the criminal law of principles and intent, have not yet reached the Utah courts.

Respondents therefore request that the petition for a writ of certiorari be denied.

CONCLUSION

For the foregoing reasons, Respondents, William Dunn, et al., respectfully pray that the Petition for Writ of Certiorari of Pamela Peck be denied.

Respectfully submitted,

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APPENDIX

FILED January 13, 1978
Geoffrey J. Butler, Clerk

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 15338

PAMELA PECK,
Plaintiff and Appellant,

vs.

WILLIAM DUNN, PETE KUTULAS, and WILLIAM HUTCHINSON, as Members of the Board of County Commissioners of Salt Lake County,
Defendants and Respondents.

CROCKETT, Justice:

Plaintiff, Pamela Peck, was charged with the offense of cruelty to animals, in violation of Title 16, Chapter 3, Section 28, Revised Ordinances of Salt Lake County, in that "at Peck Farm, at 8:50 p.m. on the 8th day of January, 1977 . . . [she did] keep or use an animal . . . to wit: a game cock, for the purpose of fighting . . . or [that she] was a party to or present as a spectator at such fighting. . . ."

In order to arrest that prosecution, she brought this action against the County Commission seeking a declaratory judgment that the ordinance is unconstitutional on the grounds: (1) that it is vague and uncertain in that innocent conduct of merely being a spectator could be included within its language; and (2) that presence at such a cock fight is proscribed, without requiring a culpable mental state. The trial court rejected her contentions and she appeals.

It is elementary that the governing authority[1] in the exercise of its police power has both the prerogative and the responsibility of enacting laws which will promote and conserve the good order, safety, health, morals and general welfare of society. The question is whether this ordinance is properly regarded as regulatory of morals. What constitutes morals is whatever conduct, customs and attitudes are generally accepted and approved at the time in the particular culture. It is therefore essential to consider whether cock fighting can be regarded as merely an innocent diversion, as plaintiffs' argument seems to suggest, or is itself an evil which may be condemned by law.

In former times the provoking and baiting of animals to fight each other for the amusement of spectators was a diversion to be accepted, or at least tolerated.[2] Indeed in yet earlier times the pitting of human beings against each other as gladiators, or against animals, was

[1]The County Commission, acting in its legislative function.

[2]**State v. Buford**, 65 N.M. 51, 331 P.2d 1110, 82 A.L.R. 2d 787 (1958); **State ex rel. Miller v. Claiborne,** Kan., 505 P.2d 732 (1973).

similarly viewed; and even today the fighting of animals is so accepted in some parts of the world. Over the centuries the disposition to look upon such brutalities with favor or approval has gradually lessened, and compassion and concern for man's fellow creatures of the earth has increased to the extent that it is now quite generally thought that the witnessing of animals fighting, injuring and perhaps killing one another is a cruel and barbarous practice, discordant to man's finer instincts and so offensive to his sensibilities that it is demeaning to morals.[3]

Whatever one's personal views may be of such matters, the legislative authority of our state has determined as a matter of public policy that such conduct is so involved in public morals and welfare that it has made cruelty to animals a crime and included therein the causing of one animal to fight with another.[4] There is no question but that a cock is an animal; and the county ordinance in question specifically so indicates by its express prohibition of the causing animals, including any fowl, to fight.[5] The county ordinance in question is in harmony with and does not extend the concept determined as the public policy of our state by statute re-

[3]See a good expression on this subject by Justice Steele, in **Bland v. People**, 32 Colo. 319, 76 P. 359 (1904). In commentary on such moral standards George B. Shaw writes: "When a man shoots a tiger to murder him, he calls it sport, but when a tiger attacks a man, he calls it a savage beast."

[4]U.C.A. 1953, Sec. 76-9-301: "(1) A person commits cruelty to animals if he . . . (f) Causes one animal to fight with another. . . ."

[5]See **Oregon Game Fowl Breeders Assn. v. Smith, Or.App.**, 516 P.2d 499 (1974), where the court held that cockfighting was prohibited by a statute proscribing cruelty to animals because the statute specifically included birds in the category of animals.

ferred to. In consequence of what we have said above, we are in agreement with the expression of respected authorities that legislation against such practices as the fighting of animals is justified for the purpose of regulating morals and promoting the good order and general welfare of society.[6]

Plaintiff's further argument is that under the literal wording of the ordinance, an innocent passing by onlooker could be found guilty. Perhaps we should appreciate her concern for an innocent person caught in such a predicament. Indeed we would; and we think that any reasoning law enforcement officer, prosecutor, judge or jury would, if such were the facts. But it does not appear that they are the facts here. In regard to plaintiff's contention, these things are to be said generally about the interpretation and application of a statute or ordinance: it is not our duty to indulge in conjecture that the statute may be so distorted or unreasonably applied that some innocent person might come within its terms. Rather, it is our duty to assume that those who administer a statute will do so with reason and common sense, in accordance with its language and intent; and further, that if there is a choice as to the matter of its interpretation and application, that should be done in a manner which will make it constitutional, as opposed to one which would make it invalid.

What has just been said also bears on plaintiff's

[6]That cruelty to animals was indictable at common law as a misdemeanor and is a proper subject for regulation by statute or ordinance, see 3A C.J.S., Animals Sec. 9. See also 16 C.J.S., Constitutional Law Sec. 174 and numerous cases therein cited.

other argument: that the ordinance denounces conduct without requiring a culpable mental state. We recognize, of course, that most crimes require a criminal intent in the doing of the act prohibited. Some require only a general intent to do an act, which is evil in itself. Examples are acts like murder, rape, kidnapping, which are said to be malum in se. In such circumstances, a person is presumed to intend the natural consequences of his act[7] and the general criminal intent with which an act was done may be inferred from the words and conduct of the actor.[8]

There are other crimes which require a specific intent. In them the prosecution must prove the intent with which the act was done.[9] For example, the elements of the crime of burglary are (1) the act of entering a building, and (2) the specific intent to commit a "felony, theft or assault" therein.[10] The entering of a building is not inherently evil, and that act alone does not give rise to a presumption or an inference that the actor entered with the requisite intent to constitute burglary. In addition to the entry, the intent to commit a "felony, theft or assault" therein must be proved, or circumstances shown from which the intent may reasonably be inferred.[11]

In addition to the classes of crimes just discussed, which require proof of intent, there is another class of crimes in which the doing of an act is prohibited by law

[7]**State v. Peterson**, 22 Utah 2d 377, 453 P.2d 696 (1969).
[8]22 C.J.S., Criminal Law Sec. 33.
[9]22 C.J.S., Criminal Law Sec. 32.
[10]U.C.A. 1953, Sec. 76-6-202.
[11]**State v. Clements**, 26 Utah 2d 298, 488 P.2d 1045 (1971); **State v. Jamison**, 110 Ariz. 245, 517 P.2d 1241 (1974).

and the doing of the act itself constitutes the crime, without regard to the intent with which it is done. They are spoken of as malum prohibitum, and are sometimes referred to as crimes of strict liability, or absolute responsibility. Examples of these are traffic regulations such as prohibiting driving through red lights, stop signs, or at excessive speeds, the carrying of loaded firearms in certain places and circumstances,[12] the carrying of concealed weapons,[13] or unauthorized possession of narcotics. With respect to this class of crimes, the only criminal intent necessary is implicit in the willful doing of the prohibited act.

Applying the principles above stated to the plaintiff's contentions, it will be seen that a sensible and practical application of the ordinance would require a person to be present as a spectator in the sense of one purposefully and intentionally attending and observing such a fight, as opposed to some mere passerby happening to so observe it. If the ordinance is thus looked at and applied in what we have stated to be a sensible and practical way, we see no justification for declaring it unconstitutional.[14] This conclusion is reinforced by the doctrine of constitutional law that the courts should defer to the legislative prerogative and should presume such enactments to be valid and should not strike down legislation

[12]U.C.A. 1953, Sec. 76-10-505.

[13]U.C.A. 1953, Sec. 76-10-504.

[14]We decide as herein indicated in awareness of **State v. Abellano**, 50 Hawaii 384, 441 P.2d 333 (1969), relied upon by the plaintiff which decided that the statute which condemned merely being "present" at a cockfight was unconstitutional because it might encompass innocent conduct.

unless it clearly and persuasively appears that the act is in conflict with a constitutional provision.[15]

Affirmed. No costs awarded.

WE CONCUR:

A. H. Ellett, *Chief Justice*

Richard J. Maughan, *Justice*

D. Frank Wilkins, *Justice*

Gordon R. Hall, *Justice*

[15]In the matter of the Estate of Utah, Baer, Utah, 562 P.2d 614 (1977); **Branch v. Salt Lake County Service Area No. 2**, 23 Utah 2d 181, 460 P.2d 814 (1969); **Gord v. Salt Lake City**, 20 Utah 2d 138, 434 P.2d 449; 16 C.J.S., Constitutional Law Sec. 99.